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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

17	MYRICK TANTIADO, an individual,	)	Case No. C 07-02874 CRB
18	Plaintiff,	)	DEFENDANT POWER MEDICAL
19	v.	)	INTERVENTIONS, INC.'S
20		)	RESPONSE TO PLAINTIFF'S
21	POWER MEDICAL INTERVENTIONS, a	)	OBJECTIONS TO EVIDENCE
22	Pennsylvania corporation, and DOES ONE	)	SUPPORTING DEFENDANT'S
23	through FIFTY, inclusive,	)	MOTION FOR SUMMARY
	Defendants.	)	ADJUDICATION
		)	Hearing Date: September 19, 2008
		)	Time: 10:00 a.m.
		)	Judge: Hon. Charles R. Breyer
		)	Courtroom: 8

Defendant Power Medical Interventions, Inc. ("PMI") submits the following responses to Plaintiff's objection to the evidence PMI submitted in support of its motion for partial summary

1 judgment. As set forth in more detail below, Plaintiff's objections are baseless, at best, and
 2 frivolous, at worse.

3 **Declaration of Michael Whitman:**

4 Plaintiff's objection that Michael Whitman's declaration was not timely filed is baseless.
 5 Nothing requires a declaration to be filed at the same time as the motion it supports. A quick
 6 perusal of Rule 56 of the Federal Rules of Civil Procedure shows that Plaintiff's objection must be
 7 overruled: "A party claiming relief may move with or without supporting affidavits, for summary
 8 judgment on all or part of the claim." Civil Local Rule 56-1 provides likewise. If the declaration
 9 is filed too close to the hearing for the opposing party to have a fair opportunity to respond, the
 10 Court may postpone the hearing. Plaintiff obviously had enough time to respond to Mr.
 11 Whitman's declaration because he already has.

12 Plaintiff's objection that Mr. Whitman's declaration is not based on personal knowledge
 13 borders on the frivolous. The first paragraph of Mr. Whitman's declaration states, "I have personal
 14 knowledge of the facts stated in this Declaration, and if called upon, could and would testify
 15 competently thereto."

16 As to Plaintiff's objection that Mr. Whitman's statement that Mr. Tantiado failed to meet
 17 the requirements for the job and was terminated in accordance with PMI's practices lacks
 18 foundation is absurd. Contrary to Plaintiff's assertion, Mr. Whitman was not required to provide
 19 the history of PMI's performance standards before he could testify that Plaintiff did not meet them.
 20 What is more, Mr. Whitman was not giving "opinion testimony," as Plaintiff would have it.
 21 Rather, Mr. Whitman was stating historical facts, namely, the reason Plaintiff's employment was
 22 terminated.

23 Plaintiff's final objection to Mr. Whitman's declaration -- that it lacks foundation as to who
 24 decided to terminate Plaintiff -- is wrong. Simply because Mr. Whitman's statement is not as
 25 detailed as Plaintiff would apparently prefer (although Plaintiff noticed Mr. Whitman's deposition
 26 but later decided not to take it) does not render the statement as lacking in foundation.
 27
 28

Declaration of Rita Esposito

Plaintiff's objections that Ms. Esposito's declaration is not based on personal knowledge borders on the frivolous. The first paragraph of Ms. Esposito's declaration states, "I have personal knowledge of the facts stated in this Declaration, and if called upon, could and would testify competently thereto."

Contrary to Plaintiff's objection, the underlying Exhibit is not hearsay because it is admissible as a business record under Fed. R. Evid. 803(6).

Nor is the Exhibit objectionable for being "redacted" because the relevant portion of the email chain is intact and has not been redacted.

Declaration of Pat Steffan

Plaintiff's objection that Ms. Steffan's declaration is not based on personal knowledge borders on the frivolous. The first paragraph of Ms. Steffan's declaration states, "I have personal knowledge of the facts stated in this Declaration, and if called upon, could and would testify competently thereto."

As to Plaintiff's objection that it lacks for opinion testimony, Ms. Steffan was not providing opinion testimony. Rather, she was stating as a fact what Plaintiff's sales numbers were. Simply because Ms. Steffan's statement is not as detailed as Plaintiff would apparently prefer (although Plaintiff noticed Ms. Steffan's deposition but later decided not to take it) does not render the statement as lacking a foundation.

Declaration of John Duke

Plaintiff's claim that the Exhibit referenced in paragraph 4 of Mr. Duke's declaration is incomplete is frivolous. Mr. Duke included in the Exhibit the interrogatory answers PMI relied upon in its motion for partial summary judgment, rather than bury the Court in every interrogatory answer regardless of whether PMI was relying on them or not.

Paragraph 6 of Mr. Duke's declaration is not hearsay. Paragraph 6 does not set forth any out of court statements by anyone other than Mr. Duke (the declarant) and thus fails to meet Fed. R. Evid. 801's definition of "hearsay."

1 As for Plaintiff's objection to the excerpts from the Deposition of Robert Chase,
2 specifically page 50 lines 2-3, as lacking in foundation for opinion testimony, Mr. Chase was not
3 stating an opinion. Rather, he was testifying to his knowledge of the effect of product returns on a
4 sales representative's commission.

5 DATED: August 22, 2008

6 Respectfully submitted,

7 BARTKO, ZANKEL, TARRANT & MILLER
8 A Professional Corporation

9 FOLEY HOAG LLP

10 By: 

11 John E. Duke

12 Attorneys for Defendant

13 POWER MEDICAL INTERVENTIONS

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